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7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF NEVADA**
9

10 UNITED STATES OF AMERICA,

11 Plaintiff,

12 v.

13 ALPINE LAND & RESERVOIR CO., *et*
al.,

14 Defendants.

15
16 In Re: Nevada State Engineer Ruling
17 No. 5759

Case No. 3:73-cv-183-LDG
Case No. D-183-LDG

Sub-File 3:73-cv-201-LDG

ORDER

18
19 In Ruling No. 5759, issued August 14, 2007, the Nevada State Engineer approved
20 three applications to change the place, but not the manner, of use of certain water rights to
21 an area known as the Carson Lake and Pasture. Prior to the change application, the
22 manner of use for the water was irrigation. Remarking that the proposed use of the water
23 when applied to the Carson Lake and Pasture "for the provision of food and habitat for
24 migratory wildlife," could "be described as irrigation," the State Engineer held that the
25 change application did not request a change in manner of use. The petitioners, the
26 Pyramid Lake Paiute Tribe and the United States of America, argue that this conclusion

1 was erroneous as the proposed manner of use of the water was for wildlife purposes
2 which, as defined by Nev. Rev. Stat. §533.023, includes “the establishment and
3 maintenance of wetlands.”

4

5 Jurisdiction to Hear the Tribe's and the United States' Petitions

6 In a related petition, the Tribe invoked this Court's reserved jurisdiction under the
7 *Alpine Decree* to appeal a decision of the State Engineer awarding non-decreed water
8 rights. The Ninth Circuit stated, in that related petition, that “subject matter jurisdiction
9 exists over the Tribe's appeal from the State Engineer's Ruling 5823 only insofar as the
10 allocation of Dayton Valley Hydrographic Basin groundwater rights is plausibly alleged to
11 affect adversely the Tribe's decreed water rights under the *Orr Ditch Decree*.” *United*
12 *States v. Alpine Land & Reservoir Co.*, 385 Fed. Appx. 770 (9th Cir. 2010). In light of the
13 Ninth Circuit's language limiting subject matter jurisdiction in that petition to the adverse
14 impact on the Tribe's *Orr Ditch* decreed water rights, the Court requested the parties to
15 brief the issue whether the Court has subject matter jurisdiction to review the Tribe's and
16 United States' petitions.

17 At the outset, the Court must note that the Court's specific concern is not whether it
18 has jurisdiction to hear appeals of certain decisions of the State Engineer. Without
19 question, the Court has such jurisdiction. In the *Alpine Decree*, the Court reserved
20 jurisdiction to review the State Engineer's decisions regarding applications to change the
21 place of diversion, the place of use or the manner of use of *Alpine Decree* water rights.
22 *Alpine Decree, Administrative Provision VII*. The Court has similarly interpreted the *Orr*
23 *Ditch Decree* as reserving to this Court the jurisdiction to review the State Engineer's
24 decisions regarding application to change the place of diversion, the place of use or the
25 manner of use of *Orr Ditch Decree* water rights. The Ninth Circuit has further recognized,
26 in petitions for review filed by the Tribe in both the *Alpine* and *Orr Ditch* litigations, that this

1 Court's jurisdiction extends to permit judicial review of decisions of the State Engineer
 2 regarding non-decreed water rights when the impact of such decisions can be "plausibly
 3 alleged to affect adversely the Tribe's decreed water rights under the *Orr Ditch Decree*." *Id.*
 4 385 Fed. Appx. 770; *United States v. Orr Water Ditch Co.*, 600 F.3d 1152, 1160 (9th Cir.
 5 2010). The Court's jurisdiction to review these types of decisions of the State Engineer
 6 does not, however, establish that this Court has jurisdiction to hear such an appeal when
 7 brought by a person who lacks standing.

8 As summarized by the Supreme Court:

9 The federal courts are under an independent obligation to examine
 10 their own jurisdiction, and standing 'is perhaps the most important of [the
 11 jurisdictional] doctrines.'" *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 230-231,
 110 S.Ct. 596, 607-608, 107 L.Ed.2d 603 (1990) (citations omitted).

12 It is by now well settled that "the irreducible constitutional minimum of
 13 standing contains three elements. First, the plaintiff must have suffered an
 14 'injury in fact'—an invasion of a legally protected interest that is (a) concrete
 15 and particularized, and (b) actual or imminent, not conjectural or hypothetical.
 16 Second, there must be a causal connection between the injury and the
 17 conduct complained of.... Third, it must be likely, as opposed to merely
 18 speculative, that the injury will be redressed by a favorable decision." *Lujan*
 19 *v. Defenders of Wildlife*, 504 U.S. 555, 560-561, 112 S.Ct. 2130, 2136, 2137,
 20 119 L.Ed.2d 351 (1992) (footnote, citations, and internal quotation marks
 21 omitted); see also, e.g., *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315,
 22 3324, 82 L.Ed.2d 556 (1984); *Valley Forge Christian College v. Americans*
 23 *United for Separation of Church and State, Inc.*, 454 U.S. 464, 472, 102 S.Ct.
 24 752, 758, 70 L.Ed.2d 700 (1982). In light of these principles, we have
 25 repeatedly refused to recognize a generalized grievance against allegedly
 26 illegal governmental conduct as sufficient for standing to invoke the federal
 judicial power. See, e.g., *Valley Forge Christian College*, *supra*; *Schlesinger*
v. Reservists Comm. to Stop the War, 418 U.S. 208, 94 S.Ct. 2925, 41
 L.Ed.2d 706 (1974); *United States v. Richardson*, 418 U.S. 166, 94 S.Ct.
 2940, 41 L.Ed.2d 678 (1974); *Ex parte Lévitt*, 302 U.S. 633, 58 S.Ct. 1, 82
 L.Ed. 493 (1937) (*per curiam*). We have also made clear that "it is the burden
 of the 'party who seeks the exercise of jurisdiction in his favor,' *McNutt v.*
General Motors Acceptance Corp., 298 U.S. 178, 189, 56 S.Ct. 780, 785, 80
 L.Ed. 1135 (1936), 'clearly to allege facts demonstrating that he is a proper
 party to invoke judicial resolution of the dispute.' *Warth v. Seldin*, 422 U.S.
 490, 518, [95 S.Ct. 2197, 2215, 45 L.Ed.2d 343] (1975)." *FW/PBS*, *supra*, at
 231, 110 S.Ct., at 607-608.

25 *United States v. Hays*, 515 U.S. 737, 742-743 (1995).

26

1 The State Engineer argues that “requiring a showing of a plausible allegation of
2 injury in addition to the standards of NRS 533.450(1) to invoke the jurisdiction of this Court
3 is inconsistent with the plain language of the *Alpine Decree* and NRS 533.450(1), and
4 could lead to the anomalous outcome that no court would have jurisdiction over a decision
5 of the State Engineer on a decreed water right.” The Court disagrees. At a minimum, the
6 Ninth Circuit has expressly recognized that when the State Engineer’s decision concerns a
7 non-decreed water right, this Court’s jurisdiction to review that decision can only be invoked
8 by a petitioner who can plausibly allege injury to a water right decreed by this Court.
9 *Alpine*, 385 Fed. Appx. 770, *Orr Ditch*, 600 F.3d at 1160. Thus, such a plausible allegation
10 of injury is not merely consistent with, but is required by, the *Alpine Decree* and NRS
11 533.450(1) in at least that circumstance. Further, requiring a plausible allegation of injury
12 does not lead to the anomalous outcome that no court will have jurisdiction over a decision
13 of the State Engineer on a decreed water right. A determination that this Court cannot hear
14 the appeal of a person who lacks standing does not lead to the conclusion that no court,
15 including this Court, has jurisdiction to hear the appeal brought by a person with standing.

16 Relying upon the second sentence of Administrative Provision VII, the Tribe
17 suggests that the only standing or interest required by the *Alpine Decree* to appeal a State
18 Engineer’s ruling on a change application is that a person feel himself aggrieved. The
19 argument is without merit for several reasons. First, Administrative Provision VII also
20 requires that the notice of appeal contain a statement of the manner in which the State
21 Engineer’s decision “injuriously affects the appellant’s interests.” Thus, the *Alpine Decree*
22 itself requires that the notice contain a plausible allegation of injury, suggesting that the
23 *Decree* itself requires that a party appealing a decision must be able to plausibly allege an
24 injury to its interests. Second, the jurisdiction of this Court to review the decisions of the
25 State Engineer is not established solely by the four corners of the *Alpine Decree*. Rather,
26 as an Article III court, this Court’s jurisdiction must also comport with the constitutional

1 minimum for standing. Third, the Ninth Circuit's decision in the appeal of State Engineer's
2 Ruling 5823 expressly requires that the Tribe plausibly allege an adverse impact to its *Orr*
3 *Ditch* decreed water rights to invoke this Court's subject matter jurisdiction. Finally,
4 applying the Tribe's argument at face value leads to the unsound conclusion that this Court
5 must hear and decide the merits of appeals brought by persons whose interest in the
6 decisions of the State Engineer lack any connection whatsoever to either the *Alpine* or *Orr*
7 *Ditch Decrees*, or the water rights decreed by this Court. Under the Tribe's proposal, a
8 former employee holding an irrational grudge against a change applicant who fired him
9 many years ago could bring an appeal because he could, quite plausibly, feel himself
10 aggrieved merely because the State Engineer ruled in favor of his former employer. The
11 Court cannot agree that standing to appeal arises from nothing more than a feeling of
12 grievance, regardless of whether that feeling results from antipathy toward a former
13 employer or is caused by an adverse impact on a legally protected interest. While
14 Administrative Provision VII suggests that any person feeling aggrieved may appeal a
15 decision of the State Engineer, the constitutional requirements of standing limit this Court's
16 jurisdiction to hear only those appeals brought by persons seeking to vindicate a legally
17 protected interest that is adversely impacted by the decision of the State Engineer.

18 As pointed out by the Tribe, this Court and the Ninth Circuit have, for many years,
19 considered and decided the Tribe's appeals of change applications of *Alpine Decree* water
20 rights that the Tribe has protested. The Ninth Circuit, however, has expressly considered
21 the question whether the Tribe has standing to appeal a State Engineer's decision
22 concerning an *Alpine Decree* water right in only a single opinion: *United States v. Alpine*,
23 887 F.2d 207 (9th Cir. 1989) (*Alpine II*). The *Alpine II* litigation involved the classification of
24 farms as "bench" or "bottom," which classification would affect the water duty. As relevant
25 to the instant matter, the Ninth Circuit noted: "The district court's final order held that the
26 Tribe would not have standing in any future dispute over land classification submitted to the

1 Watermaster because ‘[a] change of classification for a single farm unit will have an
2 insignificant and legally non-existent effect on the rights of the Paiute Tribe.’ The Ninth
3 Circuit reversed, reasoning:

4 The district court, however, proceeded on the assumption that the Tribe
5 would not be adversely affected by the decision as to any particular farm
6 because the incremental effect of changing an individual classification is
minimal. The problem is that the total effect on the Tribe’s water rights is
ultimately the sum of the individual parts.

7 *Alpine II*, 887 F.2d at 214.

8 This language confirms that the Tribe must plausibly allege that it is adversely affected by a
9 decision to have standing to appeal. Further, this language from *Alpine II* establishes that,
10 though the incremental adverse effect of a specific decision may be minimal, the *de*
11 *minimus* nature of the adverse impact does not preclude a determination that the Tribe has
12 standing to appeal, particularly where the Tribe must participate in each decision to avoid a
13 cumulative or aggregate adverse impact that is significant.

14 *Alpine II*, however, does not address the standing issue that is of concern to this
15 Court. In the *Ruling 5823* litigation, the Ninth Circuit limited this Court’s jurisdiction, and
16 thus the Tribe’s standing, to an injury to the Tribe’s *Orr Ditch* decreed water rights. The
17 language employed in *Alpine II* suggests that the Ninth Circuit either assumed or had
18 concluded that the cumulative impact of individual land classifications could have a
19 significant impact on the “Tribe’s water rights.” The Ninth Circuit expressly rested its
20 reasoning on “the total effect on the Tribe’s water rights.” The Tribe’s present petition,
21 however, does not allege an injury to its *Orr Ditch* decreed water rights. Rather, the Tribe
22 has alleged that the State Engineer’s decision allows the applicants “to receive water to
23 which they are not legally entitled, and thereby diminish the waters of the Carson River
24 available to the Newlands Project, and therefore increase the flow of the Truckee River
25 diverted to the Newlands Project and away from the lower Truckee River and Pyramid
26 Lake.” Further, in response to the Court’s request for briefing, the Tribe has not argued

1 that the State Engineer's decision will have any impact on its *Orr Ditch* decreed water
2 rights. The Tribe does not contest that its *Orr Ditch Decree* water rights were awarded in
3 Claims 1 and 2. The Tribe also does not contest that, consistent with the *Orr Ditch Decree*,
4 water can only be diverted from the Truckee River to the Newlands Project pursuant to
5 Claim 3. The Tribe also does not contest that its Claims 1 and 2 water rights are senior to
6 Claim 3. As such, the Tribe receives its entire water duty under Claims 1 and 2 before any
7 water is diverted to the Newlands Project. In short, even when considered in the
8 cumulative and aggregate, the State Engineer's decision that water applied to the Carson
9 Lake and Pasture is irrigation cannot, as a matter of law, adversely affect the Tribe's *Orr*
10 *Ditch Decree* water rights. The Tribe's present challenge does not allege an injury to its
11 *Orr Ditch Decree* water rights, but alleges the State Engineer's decision will diminish water
12 for which the Tribe lacks any rights under the *Orr Ditch Decree*.

13 Nevertheless, both *Alpine II* and *Pyramid Lake Piaute Tribe v. Morton*, 354 F.Supp.
14 252 (D.D.C. 1972) recognize that the Tribe has a protected legal interest to ensure that any
15 water that is not obligated to be diverted from the Truckee River is not diverted, but is
16 instead permitted to continue flowing in the Truckee River to Pyramid Lake. The Pyramid
17 Lake Indian Reservation includes Pyramid Lake, the land surrounding it, the lower reaches
18 of the Truckee River, and the bottom land alongside the lower Truckee. As summarized by
19 Justice Brennan in a footnote to his concurrence in *Nevada v. United States*, 463 U.S. 110
20 (1983):

21 I also note that the District Court found that one of the purposes for
22 establishment of the Pyramid Lake Reservation was "to provide the Indians
23 with access to Pyramid Lake . . . in order that they might obtain their
24 sustenance, at least in part, from these historic fisheries." App. to Pet. for
25 Cert. in No. 81-2245, at 183a. As a consequence, the Tribe retains a
26 *Winters* right, at least in theory, to water to maintain the fishery, a right which
today's ruling does not question. To some extent it may be possible to
satisfy the Tribe's claims consistent with the *Orr Ditch* decree--for instance,
through judicious management of the Derby Dam and Lahontan Reservoir,
improvement of the quality of the Newlands Project irrigation works,
application of heretofore unappropriated floodwaters, or invocation of the

1 decree's provisions for restricting diversions in excess of those allowed by the
 2 decree.

3 (Emphasis added). Thus, while the Tribe has a right to divert water pursuant to Claims 1
 4 and 2 of the *Orr Ditch Decree*, the Tribe has a further protected legal interest that arises
 5 from its *Winters* right to water to maintain a fishery. Further, as water can be diverted from
 6 the Truckee River for the Newlands Reclamation project only pursuant to Claim 3 of the *Orr*
 7 *Ditch Decree*, the Tribe can invoke "the decree's provisions for restricting diversions in
 8 excess of those allowed by the decree." Those provisions include this Court's reserved
 9 jurisdiction to hear appeals of the State Engineer's decisions regarding change applications
 10 for decreed water rights. While the Tribe must allege an injury to maintain standing, that
 11 injury need not necessarily adversely impact the Tribe's Claim 1 and 2 rights so long as the
 12 injury is plausibly alleged to be caused by a State Engineer's decision regarding a decreed
 13 water right. Accordingly, the Court has jurisdiction to hear the Tribe's appeal.

14 The Court also has jurisdiction to hear the United States' petition. The United States
 15 has obligations created by federal regulation, including the Newlands Project Operating
 16 Criteria and Procedures and the Endangered Species Act, to restrict the diversion of
 17 Truckee Water under Claim 3 to only that amount permitted by decree. See *Morton*, 354
 18 F.Supp. at 256 ("In order to fulfill his fiduciary duty [to the Tribe], the Secretary [of the
 19 Interior] must ensure, to the extent of his power, that all [Truckee River] water not obligated
 20 by court decree or contract with the [Truckee-Carson Irrigation] District goes to Pyramid
 21 Lake.")

22

23 Whether the State Engineer Erred in Finding Proposed Manner of Use is Irrigation

24 Whether the manner of use of the water at the new location is for irrigation or is for
 25 wildlife purposes is critical because "[c]hange of manner of use applications from use for
 26 irrigation to any other purpose shall be allowed only for the net consumptive use of the

1 water right as determined by [the Alpine] Decree.” *Alpine Decree*, Administrative Provision
2 VII, as amended by Order Entered September 29, 1986, Docket #688. The total water duty
3 to irrigate bottom land farmlands is 3.5 acre-feet per acre, of which the “consumptive use of
4 irrigation water is 2.99 acre-feet per acre” for farmlands in the Newlands Project. *United*
5 *States v. Alpine Land and Reservoir Co.*, 503 F.Supp. 877, 888 (D.Nev. 1980). The
6 additional 0.51 acre-feet per acre of water (that is, the difference between the water duty of
7 3.5 acre-feet per acre and the consumptive use of 2.99 acre-feet per acre) is “[w]ater that
8 has been allowed in the duties for purposes of irrigation coverage.” As noted, this
9 coverage duty of 0.51 acre-feet per acre cannot be “changed to a consumptive use.” *Id.*, at
10 893.

11 The Nevada Waterfowl Association (NWA) filed Applications 71775 and 73574,
12 each of which sought to transfer both the consumptive use and non-consumptive use
13 portions of the underlying water rights to the Carson Lake and Pasture. Finding that the
14 proposed manner of use was irrigation, the State Engineer approved the transfer of both
15 the 2.99 acre-feet per acre net consumptive use and the 0.51 acre-feet per acre non-
16 consumptive use portions of the respective water rights.

17 The Nevada Department of Wildlife (NDOW) filed Application 73444, seeking to
18 transfer only the non-consumptive use portion of the underlying water right to the Carson
19 Lake and Pasture, as the consumptive use portion of the water right was previously
20 transferred pursuant to Permit 60771. Finding that the proposed manner of use was
21 irrigation, the State Engineer approved the application to transfer the 0.51 acre-feet per
22 acre non-consumptive use portion of the water duty.

23 As to each of the three applications, the State Engineer’s decision permitting the
24 transfer of water exceeding the net consumptive use was correct only if the proposed
25 manner of use of the water at the Carson Lake and Pasture is irrigation. If the proposed
26 manner of use is not irrigation, then the State Engineer’s approval of the transfer of water

1 exceeding the net consumptive use acts to change use of the water from a non-
2 consumptive use to a consumptive use in violation of the *Alpine Decree*.

3 In his brief, the State Engineer asserts that “were these proposed changes being
4 pursued exclusively under the Nevada water code rather than the provisions of the *Alpine*
5 *Decree*, the question of whether their proposed use constitutes a change from irrigation
6 would not even be at issue.” The statement brings into focus that context is critical. As
7 pointed out by the State Engineer, “the question under NRS 533.370(5) is whether a
8 proposed change will conflict with existing rights and not whether there has been a change
9 from irrigation to some other manner of use.” Equally correct, however, is the observation
10 that the question whether the proposed change will conflict with existing rights is not at
11 issue in determining whether the appropriate fee pursuant to §533.435 is for wildlife
12 purposes. Whether the proposed change will conflict with existing rights is irrelevant to
13 determining both the appropriate fee under §533.435 and whether the proposed use is
14 irrigation under the *Alpine Decree*. The context of the present petitions requires a
15 determination whether, under the *Alpine Decree*, the proposed use of the water will be a
16 change “from use for irrigation to any other purpose.”

17 Though the context of this dispute is whether the proposed use of the water is an
18 irrigation use under the *Alpine Decree*, the State Engineer’s decision gives scant
19 consideration to any aspect of the final *Alpine Decree*, including the Court’s Findings of
20 Fact, Conclusions of Law, Administrative Provisions, and the opinion published at 503
21 F.Supp. 877 (D.Nev. 1980). Indeed, the State Engineer referenced the language of the
22 *Alpine Decree* only once in his decision. In that singular reference, the State Engineer
23 noted the *Alpine Decree*’s discussion regarding whether the United States beneficially used
24 water on federally owned land in the Newlands Project. The land was generally identified
25 as the Carson Pasture area and the Stillwater area. In that discussion in the published
26 opinion, the *Alpine Decree* observed that “the amount of land actually irrigated varies

1 greatly from year to year depending on the available water.” Emphasizing the words
2 “actually irrigated,” the State Engineer noted his prior finding that “it appears that the
3 decree court and the parties believed use of water on Carson Pasture and the Stillwater
4 areas was a form of irrigation.”

5 Further context, however, is required to establish and properly understand the
6 relevance, to the present matter, of the *Alpine Decree*’s observation that a greatly varying
7 amount of federally-owned land was “actually irrigated” by “drainage or seepage from
8 Project farms and very occasionally from direct flows.” That additional context includes the
9 *Alpine Decree*’s recognition that the parties had stipulated that “the Carson Pasture and
10 other pasture lands within the project have an irrigation water right with a priority of July 2,
11 1902” (emphasis added). Commenting on this stipulation, the *Alpine Decree* concluded
12 that it was a recognition of an historic condition “that the pasture lands are entitled to the
13 use of whatever waters flow from the lower portion of the Project vested right lands to the
14 exclusion of anyone who might seek to appropriate the waters for other uses.” Finally, as
15 the *Alpine Decree* ultimately concluded, the United States never beneficially used its water
16 rights for irrigation purposes on the pasture lands. This additional context suggests that the
17 *Alpine Decree*’s observation that the Carson Pasture was “actually irrigated” with drainage
18 water tends to suggest that the proposed use in the present matter is not irrigation. Unlike
19 the present matter, the irrigation underlying the *Alpine Decree*’s observation was
20 agricultural. The drainage water applied to the land was for pasture lands, rather than
21 being applied to wetlands in the Carson Pasture area for the conservation, rehabilitation
22 and management of wildlife, its resources and its habitat.

23 The *Alpine Decree* references irrigation extensively. As stated in the published
24 opinion, “one of the central tasks in this case is to establish a clear and specific water duty
25 for both the Newlands Project farmlands and the upper Carson farmlands.” The *Decree*
26 established that the water duty for these farmlands was that amount of water reasonably

1 necessary to grow alfalfa. The decree court did not rely upon alfalfa because it was the
2 only crop grown on all the farmlands, but because it was the dominant cash crop
3 historically grown on the farmlands. The *Alpine Decree* further recognized that “the water
4 duty is the amount of water required to properly irrigate the farmlands.” As the amount of
5 water necessary to properly irrigate a farm differed depending on the physical conditions of
6 the farm, including factors such as the steepness of the ground and the soil character, the
7 *Alpine Decree* awarded differing water duties to farmlands in different areas. Farmlands on
8 the bottom lands of the Newlands Project were awarded a water duty of 3.5 acre-feet per
9 acre. Farmlands on the bench lands of the Newlands Project were awarded a water duty
10 of 4.5 acre-feet per acre. On both bottom land and bench land farms in the Newlands
11 Project, the court determined a net consumptive use of 2.99 acre-feet per acre. The *Alpine*
12 *Decree* established differing water duties for farmlands on the upper Carson River above
13 the Lahontan region. The net consumptive use on these farmlands above the Lahontan
14 region was set at 2.5 acre-feet per acre due to the cooler climate and shorter growing
15 season. As recognized in the published decision, “one region slowly shades into the other
16 in the area between the reservoir and Carson City but for practical reasons the decree
17 treats Lahontan as the dividing line.” The non-consumptive water duty for irrigating
18 farmlands above the Lahontan region range from 2.0 to 6.5 acre-feet per acre.

19 As established in Finding of Fact IV of the *Alpine Decree*, 80,000 acres of cultivable
20 lands and 50,000 acres of pasture lands (and 7,500 acres in the Truckee Division) in the
21 Newlands Project were irrigated or susceptible of irrigation. The United States withdrew
22 232,800 acres of land for the Newlands Project. Irrigation of the cultivable lands and
23 pasture lands was necessary “to make these lands productive,” as established in Finding of
24 Fact VIII. As further establish in Finding of Fact VIII, various areas of the Carson River and
25 its tributaries require varying quantities of water “for proper irrigation and crop productivity.”
26 Finding of Fact X recites the historic practices, customs, agreements and decrees followed

1 on the Carson River and its tributaries. Within this Finding, numerous references are made
2 to specific irrigation practices. Lacking from the Finding is any suggestion that these
3 irrigation practices concerned the application of water to land other than for maintaining
4 pastures or growing cash crops.

5 In Conclusion of Law II, the *Alpine Decree* awards water rights “for the irrigation of
6 their respective lands as described in the tabulation, for generating power, for municipal
7 purposes, for supplying the people living in the cities and towns, for reclamation of arid
8 lands, for watering livestock, for domestic uses and other beneficial purposes.”

9 Administrative Provision I states: “Without the application of water, the lands
10 described above are dry and arid and irrigation is necessary for the production of valuable
11 crops thereon. The respective amounts of water stated above to have been appropriated
12 for or used on these lands, are, in each instance, the maximum amount necessary and
13 sufficient for the reasonable and economical irrigation of crops thereon.”

14 Taken as a whole, the *Alpine Decree*’s references to irrigation establish that the only
15 irrigation use contemplated by the *Decree* was for agriculture, whether for productively
16 growing valuable cash crops or for pasture lands. While the word “irrigation” can be
17 defined as any application of a liquid,¹ the *Alpine Decree* considered and referred to
18 irrigation use in the context of agriculture, and specifically to grow cash crops and pasture.
19 The decree court itself recognized that one of its central tasks was to establish a water duty
20 to irrigate farmlands.

21 The reasoning of the *Alpine Decree* further guides the Court in limiting “irrigation
22 use” to irrigation for agricultural practices such as the growing of crops and pasture. The
23 determinations made in the *Decree* do not rest upon the drawing of fine distinctions or
24 carefully-worded testimony, but upon practical considerations. As noted in the published

25
26 ¹ In a medical context, irrigation is the application of a liquid to a body part.

1 opinion in distinguishing the net consumptive use between the upper region and the
2 Lahontan region, though one region gradually shades into another, practical reasons
3 dictated the drawing of a line. Regardless of the specific crop grown on a farm, the water
4 duty for all forms of irrigation was determined based upon the amount of water needed to
5 grow alfalfa. Although the decree court expressly recognized that the water duty depended
6 on differing physical characteristics between farmlands, water duties were not established
7 on a farm-by-farm basis. Rather, though differing soil conditions and other physical
8 characteristics slowly shade from farm to farm on the bottom lands of the Project, all
9 bottom land farms receive a water duty of 3.5 acre-feet per acre under the *Alpine Decree*.

10 At a practical and common-sense level, the best description of the proposed use of
11 the water is established by the State Engineer's finding "that the NDOW has the right to
12 develop, manage and administer the Carson Lake and Pasture area for the purposes of
13 conservation, rehabilitation and management of wildlife, its resources and habitat, and that
14 the Carson Lake and Pasture area is to be managed as a State Wildlife Management Area.
15 Management of the area contemplates the transfer of water to the area for wetlands
16 protection." The NWA has an agreement with NDOW that allows the NWA's water rights to
17 be used in the management of the Carson Lake and Pasture. This proposed use of the
18 water is for wildlife purposes.

19 Nevada has statutorily defined "wildlife purposes" to include "the watering of wildlife
20 and the establishment and maintenance of wetlands, fisheries and other wildlife habitats."
21 Nev. Rev. Stat. §533.023. A straight-forward reading of this statute and of the State
22 Engineer's finding regarding the right of NDOW to develop and manage the Carson Lake
23 and Pasture permits only the conclusion that the NDOW must use the water for wildlife
24 purposes, including the maintenance of wetlands, rather than for the irrigation of farmlands.

25 As connoted by and used in the *Alpine Decree*, irrigation use refers to the
26 application of water to farmland for pasture or for the production of valuable crops (that is,

1 cash crops or agricultural crops such as alfalfa). As established by §533.023, the watering
2 of wildlife and the establishment of wetlands and other wildlife habitats is a wildlife purpose.
3 The applicants' proposed use of the water is for wildlife purposes. Accordingly, the Court
4 must reverse Ruling #5759.

5 In addition, even if the proposed use should be described as irrigation for purposes
6 of determining whether it constitutes a change of use under the *Alpine Decree*, the Court
7 would vacate Ruling #5759. The *Alpine Decree* expressly drew a distinction between the
8 total water duty allowed for proper irrigation and the net consumptive use of the surface
9 water for that irrigation. The *Decree* also expressly directed the State Engineer to permit a
10 change in use from irrigation to any other use only for the consumptive use amounts. The
11 purpose of this directive was so that "water that has been allowed in the duties for
12 purposes of irrigation coverage could not then be changed to a consumptive use and
13 disappear from the return flows to other water right lands or the river." The findings of the
14 State Engineer suggest that the physical characteristics of the wetlands and Carson Lake
15 and the express purpose of maintaining a wetland require a finding that all water applied
16 will be used consumptively. Such a change from non-consumptive irrigation use to
17 consumptive irrigation use violates the *Alpine Decree*, even if the underlying use of the
18 consumptive use water duty is for irrigation.

19 Accordingly, for good cause shown,

20 THE Court **VACATES** State Engineer's Ruling #5759 to the extent that it finds and
21 concludes that Application Nos. 71775, 73574, and 73444 did not propose a change in
22 manner of use of the water rights decreed and awarded under the *Alpine Decree*. The
23 existing manner of use for the *Alpine Decreed* water rights underlying Application Nos.
24 71775, 73574, and 73444 was irrigation. Pursuant to the *Alpine Decree*, use of *Alpine*
25 *Decreed* water rights for irrigation is for the irrigation of cash crops and pasture on
26 farmlands. The proposed manner of use for these water rights is for wildlife purposes on

1 wetlands. The proposed manner of use for these *Alpine Decreed* water rights is not for
2 irrigation under the *Alpine Decree*. The proposed manner of use is a change in manner of
3 use.

4 Pursuant to *Alpine Decree* Administrative Provision VII, the State Engineer could
5 approve the change application from irrigation to wildlife purposes for only the net
6 consumptive use water duty of 2.99 acre-feet per acre. Therefore,

7 The Court **REVERSES** the State Engineer's grant of Application Nos. 71775 and
8 73574 to the extent it approved the transfer of the non-consumptive water duty of 0.51
9 acre-feet per acre.

10 The Court **REVERSES** the State Engineer's grant of Application No. 73444, which
11 requested to transfer only the non-consumptive use water duty of 0.51 acre-feet per acre.

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DATED this 11 day of May, 2011.

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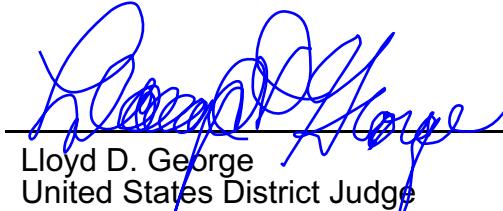
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Lloyd D. George
United States District Judge